No. 13126

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHRISTINE ALLEN,

Appellant,

vs.

RALPH MEYER, Trustee in Bankruptcy of the Estate of Joseph E. Allen, Bankrupt,

Appellee.

APPELLANT'S OPENING BRIEF.

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Origin of the Appeal.

This is an appeal by Christine Allen, the former wife of the bankrupt, from an order of the District Court upon a petition for review affirming an order of the Referee adjudging that appellant has no right, title or interest in or to certain personal property and quieting title to the same in the Trustee. The facts are not in dispute and upon such a recognition by the Referee [Tr. pp. 6 to 7, "Evidence"], the order of the Referee was primarily predicated upon documentary evidence introduced into evidence as exhibits on behalf of the appellant in the proceedings before the Referee, which evidence consists of a property settlement agreement between the appellant and the bankrupt [Tr. pp. 49 to 62], an interlocutory decree of divorce in a divorce proceeding between appellant and

the bankrupt [Tr. pp. 63 to 64], a final decree of divorce in the divorce proceeding [Tr. pp. 65 to 66], and certain pleadings in an action commenced in the State court after the divorce proceedings for the enforcement of the terms of divorce decrees and of the property settlement agreement [Tr. pp. 67 to 86]. The appeal comes before this Court, as it did before the District Court, without a reporter's transcript.

Jurisdictional Statement.

The original jurisdiction of the District Court was invoked by the bankrupt under section 4 of the Bankruptcy Act by the filing of his petition to be adjudged a voluntary bankrupt under the provisions of said Act.

The summary jurisdiction of the Referee to pass upon the claim of appellant to an undivided one half interest as a tenant in common with the bankrupt in the personal property employed in the conduct of the drugstore business was invoked by a finding by the Referee that the bankrupt was in possession of said property, and that upon the appointment and qualification of his Receiver in Bankruptcy herein, the bankrupt delivered possession of the same to the Receiver and that appellant at no time was in possession [Tr. pp. 34 to 35, Findings IV, V, and VI].

The jurisdiction of the District Court on review was invoked by appellant filing her "Petition for Review of Referee's Order Quieting Title" [Tr. pp. 41 to 47], under section 39-c of the Bankruptcy Act, directed toward the Referee's "Findings of Fact and Conclusions of Law Re: (1) Determination of Title to Personalty; (2) Restraining State Court Litigation" [Tr. pp. 31 to 41].

The jurisdiction of this, the Court of Appeals of the United States for the Ninth Circuit, was invoked by appellant under section 24-a of the Bankruptcy Act, by the filing on August 29, 1951, of her "Notice of Appeal" [Tr. p. 48], directed toward the "Order on Petition for Review" filed July 31, 1951 [Tr. pp. 47 to 48], which order affirmed the Referee's "Findings of Fact and Conclusions of Law Re: (1) Determination of Title to Personalty; (2) Restraining State Court Litigation" [Tr. pp. 31 to 41].

Statement of Facts.

Christine Allen and the bankrupt herein were married on December 31, 1933. During the continuance of their marriage these parties acquired a drug store business in the Town of Lone Pine, California, which business and assets thereof were community property. In 1949 unhappy differences had arisen between the parties and on June 8, 1949, they entered into a property settlement agreement [Tr. p. 49]. Thereafter and on June 9, 1949, an interlocutory decree of divorce was rendered in favor of the wife [Tr. p. 63]. Thereafter on June 26, 1950, the wife received a final decree of divorce [Tr. p. 65]. By the terms of both the interlocutory and final decrees the property settlement agreement was submitted to the Court, approved by the Court, and referred to in such decrees and each of the parties thereto was ordered by the Court to perform his or her respective obligations thereunder.

At the time of the entry of the interlocutory decree of divorce the assets of said drug store business consisted, and now consists, of an off-sale alcoholic beverage license issued to and in the name of the bankrupt, a stock in

trade of alcoholic beverages, a stock in trade of drugs, medicines and sundries, furniture, fixtures, accounts receivable and good will belonging to said business [Finding IX of Referee's Findings of Fact and Conclusions of Law—Tr. p. 36]. By the terms of the property settlement agreement the parties agreed that this drug store business and the assets thereto pertaining were community property and no question has ever been raised either in the divorce proceedings or in the proceedings before the Referee that the drug store business and the assets thereto pertaining had any character other than the community property of the parties immediately prior to the entry of the interlocutory decree.

At the time of the execution of the property settlement agreement both Christine Allen and her husband, the bankrupt herein, were represented by counsel and the property settlement agreement represents the result of the negotiations had between the parties and their respective counsel looking toward a division of the community property and the drug store business was the principal asset of the community. In substance the parties stipulated that the business was a community asset and that it should remain a community asset after the execution of the property settlement agreement and until the entry of an interlocutory decree of a court of competent jurisdiction in an action by and between the parties in which event, namely, the entry of an interlocutory decree, the business was to be owned by the parties as tenants in common, each owning an undivided one-half interest therein and the business was to remain thereafter under the active management of the husband.

There is no question presented in these proceedings as to whether this community property would be chargeable

with the debts contracted during the existence of the community up until the entry of the interlocutory decree. The Referee has found that with the exception of one creditor, namely, Lester A. Johnson, there are no creditors of the bankrupt in existence today whose debts arose prior to the execution of the property settlement agreement, and, as to this particular creditor, Christine Allen is obligated with the above named bankrupt by reason of their joint execution of the promissory note evidencing the debt to said creditor [Finding X—Tr. p. 36]. The bankrupt in operating the drug store business incurred obligations from time to time and has repaid some of said obligations from the receipts of the drug store business.

Prior to the filing of his individual voluntary petition to be adjudged a bankrupt, the bankrupt filed in the District Court a petition in the name of an alleged copartnership consisting of appellant and the bankrupt and praying that the said firm be adjudged a bankrupt. Appellant opposed said petition on the ground that she was not a partner. After a hearing, appellant's position was sustained and it was adjudged that no copartnership whatsoever existed between the bankrupt and appellant and the petition in the name of the alleged copartnership was dismissed [Tr. p. 37].

On May 17, 1951, the bankrupt filed his voluntary petition herein to be adjudged a bankrupt. Thereafter, on May 24, 1951, the respondent filed herein a petition entitled "Proceedings to Determine Title and Order to Show Cause" alleging in substance that no notice of intention to transfer was filed prior to the execution of the property settlement agreement or prior to the entry of the interlocutory decree and that by reason thereof appellant's claim to ownership of one-half of the assets of the busi-

ness was void as against creditors [Tr. pp. 8 to 12]. Appellant answered said petition, admitted that no notice of intention to transfer was ever filed, and alleged that none was necessary or required by law, set forth her title as a tenant in common with the bankrupt and her ownership of an undivided one-half interest in the assets and asserted several affirmative defenses consisting of a claim that the District Court had no jurisdiction in a summary proceeding over the subject matter or the person of appellant and that another action was pending between the bankrupt and appellant in the state court involving the issue, among others, of the partition of the assets of the business [Tr. pp. 12 to 16]. After a hearing the Referee made an order dismissing said petition without prejudice to further proceedings to determine appellant's title to the assets of the business [Tr. p. 31].

Thereafter, on June 12, 1951, Respondent filed another petition herein entitled "Petition to Determine Title to Personal Property and Order to Show Cause," alleging in substance that no notice of intention to transfer was filed prior to the execution of the property settlement agreement or prior to the entry of the interlocutory decree of divorce, and alleging, further, that by the terms of the property settlement agreement appellant appointed the bankrupt her agent for the purpose of managing, operating, and controlling the business and that in the course of that agency the bankrupt incurred his scheduled debts and alleging that by reason of said agency, appellant was estopped to assert any interest in the assets of

the business adverse to the bankrupt's creditors [Tr. pp. 17 to 20]. Appellant answered the petition by setting forth her claim of ownership to an undivided one-half interest as a tenant in common with the bankrupt to all of the personal property used in the business, admitted that no notice of intention to transfer was ever filed, but alleging that the property settlement agreement was recorded in December 1949 and again asserted that no such notice of intention was required by law, and denied the allegations of the petition that the bankrupt was the agent of appellant in incurring his scheduled debts and denied that she was estopped to claim her ownership of an interest in the assets, and affirmatively alleged that there was no jurisdiction of the Bankruptcy Court to pass upon her title [Tr. pp. 26 to 30]. After a hearing on this petition the Referee made his order, which is under review in this appeal, adjudging that appellant had no interest in the assets of the drugstore business and enjoining appellant from further prosecuting the state court action pending between appellant and the bankrupt for partition of the property [Tr. pp. 39 to 41]. This order was based upon consolidated findings of fact and conclusions of law in reference to the petitions of May 24, 1951 and June 12, 1951 [Tr. pp. 31 to 39]. In his consolidated conclusions of law, the Referee concluded in substance that: (a) The Bankruptcy Court had summary jurisdiction over the subject matter of the petitions to determine appellant's interest; (b) Under the property settlement agreement and after the entry of the interlocutory decree, appellant had merely an interest as a tenant in common in the net

worth of the business and not an interest in the assets thereof; (c) The transfer to appellant of an "interest as a tenant in common in the net worth of the said business" was void as against creditors of the bankrupt for the reason the transfer of said interest was not accompanied by an immediate delivery by the bankrupt to appellant of the assets of the business and was not followed by an actual and continued change of possession; and (d) The transfer of said interest was not void as against the Trustee by reason of the fact that no notice of intended transfer was filed.

Specifications of Error.

A. The District Court erred in holding that the interest acquired by appellant in the drugstore business was under the terms of the property settlement agreement, after the entry of the interlocutory decree, an interest as a tenant in common with the bankrupt in the net worth of the business and not an interest in the physical assets of the business.

B. The District Court erred in holding that the conversion of appellant's antecedent community property interest in the drugstore business to a tenancy in common interest with the bankrupt in the net worth of the business was a transfer void as against creditors of the bankrupt and holding that such a conversion was a transfer requiring an immediate delivery by the bankrupt to appellant of the assets of the business to be followed by an actual and continued change of possession.

ARGUMENT.

I.

The Property Settlement Agreement Did Not Itself Disturb, Modify, Convert or Otherwise Diminish or Augment the Property Rights of the Spouses in the Drugstore Business and the Business Remained After the Execution of the Agreement, as It Did Before, the Community Property of the Spouses.

No present transfer of any interest whatsoever was made by either of the spouses to the other by the execution of the property settlement agreement.

> "The drugstore above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest. The drugstore shall remain under the active management and control of the husband. In the event that said drugstore is sold, there shall be paid to the wife the sum of fifteen thousand dollars ($15,000.00) from the proceeds of such sale, in full satisfaction of her right, title and interest in and to the drugstore, and upon such sale the husband shall establish a trust fund in the amount of ten thousand dollars ($10,000.00) for the use of said minor children at any time their needs may require it, but primarily for the purpose of obtaining a higher education for them . . ." [Tr. pp. 55 to 56, par. Fourteenth.]

Not only was the title to the business as the community property of the spouses left undisturbed by the execution of the property settlement agreement, but also its execution did not alter any of the legal incidents or attributes of property of this character. The possession and control

of the business remained in the husband after the execution of the agreement. The possession and control of community personal property is by law vested solely in the husband and his exclusive dominion over it is subject only to the limitation that he may not deal with it in fraud of the rights of the wife. In the case at bar the husband retained his possessory prerogative. We shall discuss more fully the community property character of the rights of the parties in this business at another point.

Section 3440 of the Civil Code operates only upon a technical transfer of title.

> "Every transfer of personal property . . . is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void . . ."
>
> Civil Code, Sec. 3440.

Section 3440 of the Civil Code contains several important limitations and exceptions to its operation. The statute is one of technical operation and its proper application requires in many cases, as it does in this, a determination of the nature and origin of the transaction under consideration. Its liberal construction has not lead the courts to ignore its plain limitations or exceptions.

Since neither the quantum nor quality of the spouses' estate in the business as community property was changed in any degree by the terms of the property settlement agreement, and, since they thereby preserved to the business all of the legal incidents of this type of ownership, the execution *per se* of the agreement did not transfer any interest in the business from either spouse to the other.

II.

The Conversion of Appellant's Antecedent Community Property Interest to a Tenancy in Common Interest Was Not in Violation of Section 3440 of the Civil Code for the Reason That It Was a Transaction Falling Within One or Two of the Exceptions or Exemptions Contained in That Section.

A. The Conversion of Appellant's Community Interest to a Tenancy in Common Interest Was Made Under the Direction or Order of a Court of Competent Jurisdiction.

The interlocutory decree of divorce provided in part as follows:

> "It is further ordered, adjudged and decreed that the property settlement and child custody agreement, an executed copy of which was filed with the Court on this date, be and the same is hereby approved in all respects, and each party thereto is hereby ordered and directed to meet and observe the obligations therein contained incumbent upon them respectively." [Tr. p. 64.]

The final decree of divorce contained substantially the same provision [Tr. p. 66].

Section 3440 in general contains three mandatory provisions and five exceptions or exemptions to these mandatory provisions. In its mandatory aspects, the statute applies to only three situations: (1) Requires every transfer of personal property to be accompanied by immediate delivery, followed by an actual and continued change of possession; (2) Provides for a special method of transfer for wines in their containers; and (3) Requires the recordation and publication of a notice of intention to transfer the stock in trade or fixtures of a merchant. To all

of these general requirements the statute expressly provides a number of exceptions or exemptions to its operation which may be summarized as: (1) Transfers made under direction or order of court of stock in trade or fixtures of a merchant; (2) Transfers by any person in discharge of official duty; (3) Transfers by any person in discharge of any trust imposed by law; (4) Transfers to or by an assignee for the benefit of creditors; and (5) Transfers of exempt property. Of these exceptions those applicable to the case at bar are exceptions numbered (1) and (3).

> ". . . provided further, that the provisions of this section shall not apply or extend to any sale, transfer, or assignment of a stock in trade nor to any sale, transfer, assignment or mortgage of the fixtures, or store equipment, of a baker, cafe or restaurant owner, garage owner, machinist, cleaner and dyer or retail or wholesale merchant made under the direction or order of a court of competent jurisdiction or by an executor, administrator, guardian, receiver, or other officer or person acting in the regular and proper discharge of official duty, or in the discharge of any trust imposed upon him by law . . ."
>
> Civ. Code, Sec. 3440.

The exemption in favor of judicial transfers was added in 1903 to the end of section 3440 as it then stood. This amendment was necessary because the decided cases had left the point in some doubt and a case decided shortly before the amendment had created some confusion. In an early case the Supreme Court had declined to pass upon the applicability of the Statute of Frauds to judicial sales (*O'Brien v. Chamberlain* (1875), 50 Cal. 285, 289).

Later, the Supreme Court held that where a judgment creditor purchased at execution sale and permitted the judgment debtor to retain possession, such a lack of delivery and change of possession might be relied upon as showing an element of actual fraud to avoid the sale (*Davis v. Drew* (1881), 58 Cal. 152, 158). In a case decided shortly before the 1903 amendment, the Supreme Court held that where a stranger purchased at execution sale and permitted the judgment debtor to retain possession, such a lack of delivery and change of possession did not *per se* invalidate the purchaser's title although such a showing might be relied upon as an element of actual fraud (*Matteucci v. Whelan* (1899), 123 Cal. 312, 55 Pac. 990). Thus the state of the law at the time of the amendment was that the rule was different where a stranger purchased at the sale from the situation where the judgment creditor bid the property in, and in both instances the judgment debtor's retention of possession was to be considered as an element of actual fraud. In adopting this amendment the Legislature adopted the English rule of complete immunity for judicial transfers.

In 1903 section 3440 was substantially revised by the Legislature. The section was completely repealed. The old text of the section was reenacted. However, the Legislature added two new provisions to the old text, namely, the provisions relating to bulk sales and the provisions relating to the exceptions or exemptions to the operation of the statute. The section as it was recast in 1903 concluded with the provisions relating to the exceptions or exemptions.

It is of paramount importance to note that the 1903 amendment provided a *complete,* and not a partial, immunity of judicial transfers from the provisions of section

3440. The exemption provisions were added at the *end* of the section and were directed to all of the antecedent provisions of the section. The 1903 provisions commenced as follows: "provided further, that the provision*s* of this section shall not apply . . ." (Italics added.)

The text of the 1903 amendment, adding the exemption provision, is susceptible to no other construction than that the provision in reference to judicial sales dispensed with compliance with the requirement of immediate delivery and a change of possession for such sales.

The exemption provision in reference to judicial transfers is not directed solely to notices of intended sale. Where a stock in trade and fixtures of merchant are the subject of a judicial sale, the provision dispenses with not only the requirement of the recordation and publication of a notice of intended transfer, but also of the requirement of an immediate delivery and a change of possession. This is the only construction, we submit, which can be placed upon the exemption provisions in view of the cases leading up to its adoption. These cases were all decided at a time when there was no bulk sale provision in the section and involved the claim of subsequent attaching creditors, that a prior execution sale was void because the purchaser at the prior sale, permitted the debtor to retain possession without affecting an immediate delivery, followed by an actual and continued change of possession.

The referee, in his conclusions of law [Tr. p. 38, par. II], ignored the plain language of section 3440 exempting judicial sales from *all* of the provisions of the section and concluded that there was a requirement for immediate delivery and change of possession at the time of the entry of the Interlocutory Decree of Divorce.

Counsel for appellant have been unable to find any cases decided since 1903 construing the exemption provision contained in section 3440 in reference to transfers made at the direction or order of court. The broad and clear language of the provision is, we submit, the reason for this lack of later decision.

B. The Conversion of Appellant's Community Interest to a Tenancy in Common Interest Was in Discharge of a Trust Imposed by Law Upon the Bankrupt.

1. The statute specifically exempts from its operation transfers by any person ". . . in the discharge of any trust imposed upon him by law . . ."

Civil Code, Sec. 3440.

2. In the management and disposition of community personal property a trust is imposed by operation of law upon the husband in favor of the wife and in such dealings the husband is held accountable for the discharge of obligations imposed by law upon fiduciaries.

Fields v. Michael (1949), 91 Cal. App. 2d 443, 205 P. 2d 402.

"The position of the husband, in whom the management and control of the entire community estate is vested by statute (Civil Code, sections 161a, 172, 172a), has been frequently analogized to that of a partner, agent, or fiduciary." (Citing many cases.)

Fields v. Michael, supra, p. 447.

3. Any contract or transaction between husband and wife is governed by the rules governing persons occupying confidential relations as defined by the title on "trusts" contained in the Civil Code.

Civil Code, Sec. 158.

III.

Even if the Property Settlement Agreement Did by Its Terms Transfer to Appellant an Interest in the Assets of the Business, and Even if the Interlocutory and Final Decrees of Divorce Did Not Transfer Any Such Interest to Appellant, Which We Do Not Concede, the Conversion of Appellant's Antecedent Community Interest to a Tenancy in Common Ownership With the Bankrupt Was Within Several Well Recognized Exceptions to the Statute of Fraudulent Transfers.

Appellant contends that the bankrupt was not required to make any immediate delivery of any of the assets of the business to her at any time for the reason that the conversion of her antecedent community property interest to a tenancy in common interest was outside the operation of the Statute of Fraudulent Transfers. She has earlier discussed in this brief the applicability to this conversion of interest of the exceptions contained in the statute in reference to transfers at the direction or order of court and transfer in discharge of a trust imposed law. Assuming for the purposes of the argument only that neither of these statutory exceptions apply to this conversion of interest, appellant advances three principal contentions: (1) That since appellant was not in actual physical possession of the property at any time, no immediate delivery on her part was required to pass a title to the bankrupt, valid as against her creditors, and that since she could pass to him all of her title in the community property without any delivery whatsoever, she could pass to him less than all of her title; (2) That the interest appellant received for the interest which she validly transferred to the bankrupt is valid as against his creditors since her correspond-

ing interest was acquired contemporaneously with and was of the same quantum and quality as the interest validly acquired by the bankrupt; and (3) That since the bankrupt was at all times in possession of the property, no delivery whatsoever was required for any transfer from appellant to the bankrupt for the reason that a transfer to a vendee in possession is outside the scope of the statute; and no delivery by the bankrupt to appellant was required for the further reason that the statute does not require idle acts or absurd formalities, and its application to this case would require the bankrupt to put himself out of possession to acquire a legal possession and to forego the exercise of the right to possession of the property which was an incident of his ownership as a tenant in common.

Unless the conversion of appellant's antecedent community property interest to a separate interest as a tenant in common in the business violated the Statute of Fraudulent Transfers or some strong public policy, there would appear to be no reason why her interest in the business should not be recognized by the trustee. With a single exception, all of the bankrupt's debts were incurred after the entry of the interlocutory decree [Tr. p. 36]. However, the exact nature of appellant's antecedent interest in the business is important to a consideration of additional exceptions to the operation of the Statute of Fraudulent Transfers. Before considering these exceptions we shall comment upon a few of the legal attributes of appellant's antecedent community interest in the business.

A. Appellant Had a Present, Existing and Equal Interest in the Business Prior to, at the Time of, and Subsequent to the Execution of the Property Settlement Agreement.

1. The property settlement agreement recognized the community nature of the business.

> "Eleventh: The parties hereto are the owners of the following described community property:
>
> "1. That certain drugstore business conducted in the Town of Lone Pine, County of Inyo, State of California, commonly known as Jerry's Mt. Whitney Drugstore; * * *" [Tr. pp. 53 and 54.]

The Referee's findings of fact recognized the antecedent community nature of the business [Tr. p. 33].

2. Appellant's ownership interest in the business was coordinate with that of the bankrupt at the time of the execution of the property settlement agreement.

> "The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."
>
> Civil Code, Sec. 161a.

The statutes in effect at the time of the acquisition of property determines its community character and the quantum and quality of the spouses respective interests therein.

> *Strong v. Strong* (1943), 22 Cal. 2d 540, 140 P. 2d 386.

Since the enactment of section 161a of the Civil Code in 1927, the wife has a vested interest in one-half of the earnings of the husband and the accumulated proceeds thereof.

Wessner v. Wessner (1949), 89 Cal. App. 2d 759, 764, 201 P. 2d 837;

Cooke v. Cooke (1944), 65 Cal. App. 2d 260, 266, 150 P. 2d 514.

During the existence of the marriage the wife's interest in the community property is recognized as separate from that of the husband requiring its separate treatment under the revenue laws:

United States v. Malcolm (1931), 282 U. S. 792, 51 S. Ct. 183, 75 L. Ed. 714;

Boland v. Comr. Int. Rev. (1941), 118 F. 2d 662;

Comr. of Int. Rev. v. Cavanagh (1941), 125 F. 2d 366;

O'Bryan v. Comr. of Int. Rev. (1945), 148 F. 2d 456.

3. So long as the business was community property of appellant and the bankrupt, the management, control and right to the possession of its assets was vested in the bankrupt by operation of law.

"The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; . . ."

Civil Code, Sec. 172.

This absolute right of the husband to the management and control of community personal property is subject only to the limitation that the husband may not make a gift of the wife's interest without her consent.

Civil Code, Sec. 172.

The corollary to rule of the exclusive possessory prerogative of the husband to community personal property, is that the wife has no right to the possession of such property and that her consent to the husband's exercise of his possessory prerogative adds nothing to his rights.

Cox v. Kaufman (1946), 77 Cal. App. 2d 449, 175 P. 2d 260;

Sampson v. Welch (1938), 23 Fed. Supp. 271.

The Referee in his findings found that the business was community property prior to and at the time of the execution of the property settlement agreement [Tr. p. 33]. His finding that appellant did not have possession of the business and did not manage it at any time before the entry of the interlocutory decree [Tr. p. 35] and his finding that the bankrupt managed and had possession of the business prior to the entry of the interlocutory decree [Tr. pp. 34 to 35] only confirm his finding of its antecedent community character.

By law appellant was under a disability to make any delivery of the assets of the business or of her interest therein to her husband either prior to the execution of the property settlement agreement or subsequent thereto and before the entry of an interlocutory decree. The

agreement preservd the community character of the business for an indefinite time. To require appellant to have made an immediate delivery of that which she did not in fact possess and that which she could not in law control, would be to construe one section to override another section of the same code. The requirement of the doing of an illegal act is not the mandate of any statute. We shall later consider whether there was any requirement for the making of an immediate delivery at the time of the entry of the interlocutory decree; however, until the entry of such a decree, no omission on the part of appellant or the bankrupt to make an immediate delivery could prejudice the rights of either. Moreover, until then, the possession of the bankrupt was, in the contemplation of the law, the possession of appellant as his wife.

4. Property settlement agreements are favored by the law.

> "The agreement in evidence made a division or adjustment of the respective rights of the parties in both community and separate property. It is especially authorized by section 159 of the Civil Code. When such agreements are not procured through fraud, undue influence, or coercion, they are highly favored in the law. (Hensley v. Hensley, 179 Cal. 284, 287/183 Pac. 445/.)"
>
> *Makzoume v. Makzoume* (1942), 50 Cal. App. 2d 229, 230, 123 P. 2d 72.

B. The Statute of Fraudulent Transfers Has No Application to a Transfer of Property Not in the Possession or Control of the Transferor.

The order of the Referee adjudging that appellant has no interest in the assets of the business [Tr. p. 40, par. III] is predicated upon his conclusion of law that the *bankrupt* failed to make an immediate delivery of the assets of the business to appellant [Tr. p. 38, par. II]. Just when, in reference to the execution of the property settlement agreement and the entry of the interlocutory and final decrees of divorce, the Referee considered such a delivery and change of possession to have been required by the Statute of Fraudulent Transfers, is not clear from his findings and conclusions. However, the Referee did not conclude that appellant's interest failed because she failed to make an immediate delivery of the assets to the bankrupt. Had the Referee considered that appellant was required to make an immediate delivery to the bankrupt, the conversion of her antecedent community interest to a tenancy in common interest would have been void as against her creditors.

Analytically it is difficult to determine exactly what interest was transferred by either appellant or the bankrupt to the other by the conversion of their community property to a tenancy in common ownership. After the conversion the quantum of their respective interests remained as before, each owning an undivided equal interest. Except for the right to freely alienate her interest without the consent of the bankrupt, the only other new right acquired by appellant by the conversion was the right to the possession of the property equally with the bankrupt. The bankrupt by the conversion acquired no new right to the possession of the property.

If the bankrupt did acquire an interest as a tenant in common with appellant in the property valid as against appellant's creditors, we believe that the corresponding interest acquired by appellant therein, *contemporaneously* with and of the same quantum and quality as the interest validly acquired by the bankrupt, should also be valid as against the creditors of the bankrupt. Whatever appellant received for that which she validly transferred must be valid.

1. The Statute of Fraudulent Transfers is applicable only to transfers where the transferor is in possession.

> "Every transfer of personal property . . . is conclusively presumed if made by a person *having at the time the possession or control of the property,* and not accompanied by an immediate delivery . . . to be fraudulent, and therefore void, against those who are his creditors *while he remains in possession.* . . ." (Sec. 3440, Civil Code; Italics added.)
>
> "Where the vendor is not in possession of the property or it is not under his control, a sale thereof is not within the rule requiring immediate change of possession . . ."
>
> 12 Cal. Jur. 1004-5.

2. The rule that the Statute of Fraudulent Transfers has no application to transfers made at a time when the transferor does not have possession is predicated upon the limitation imposed by the language of Section 3440 making it applicable only to transfers ". . . made by a person

having at the time the possession or control of the property . . ."

Cosby v. Cline (1921), 186 Cal. 698, 701, 200 Pac. 801;

Curtner v. Lyndon (1900), 128 Cal. 35, 37, 60 Pac. 462;

Anglo-California Nat. Bank v. Rasmussen (1935), 6 Cal. App. 2d 337, 339, 44 P. 2d 407.

3. Where a tenant in common who is out of possession transfers his interest to a third person, no delivery is necessary and the continued retention of possession by the cotenant in possession does not render the transfer void as against creditors of the transferor.

Yank v. Bordeaux (1899), 23 Mont. 205, 58 Pac. 42.

See:

Brown v. O'Neal (1892), 95 Cal. 262, 266, 30 Pac. 538.

"At the time of the transfer they were not in possession or control of the ore, but their co-owners were then lawfully in the actual possession and control of the common property, and so remained until it was sent to the smelter for milling and reduction. Under such circumstances, a sale by a tenant in common may not be avoided by creditors on the ground that the chattel was not delivered to the purchaser, for, as Mr. Freeman expresses the rule of law . . ."

Yank v. Bordeaux, supra, p. 44.

The rule of *Yank v. Bordeaux, supra,* would appear to be the law of California. The case was decided under a statute (Montana Civil Code, Sec. 4491) patterned after Section 3440 of the California Civil Code. The case was decided upon the same authorities and by the same reasoning as were used in the opinion of *Brown v. O'Neal, supra,* and the California case was cited as authority.

C. The Statute of Fraudulent Transfers Has No Application to a Transfer of Property Already in the Possession of the Transferee.

1. Where an agent has possession of personal property at the time the agent acquires title there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Hogan v. Cowell (1887), 73 Cal. 211, 14 Pac. 780;

Ellis v. Funk (1916), 32 Cal. App. 426, 429, 163 Pac. 332;

Gray v. Little (1929), 97 Cal. App. 442, 449, 275 Pac. 870.

2. Where a mere bailee in possession acquires the title of the bailor there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Banning v. Marleau (1894), 101 Cal. 238, 241, 35 Pac. 772.

3. Where one tenant in common in possession acquires the interest of his cotenant there is no requirement of an immediate delivery, followed by an actual and continued change of possession.

Visher v. Webster (1859), 13 Cal. 58, 61.

However, where a tenant in common who has possession transfers his entire interest to a third person, the transfer must be accompanied by an immediate delivery and followed by an actual and continued change of possession.

Brown v. O'Neal (1892), 95 Cal. 262, 266, 30 Pac. 538;

Haster v. Blair (1940), 41 Cal. App. 2d 896, 899, 107 P. 2d 933.

"In other words, where the tenant in common is in possession of the property, and he transfers his interest to another without a transfer of possession, section 3440 of the Civil Code may be invoked to protect a creditor of that other, and the property may be seized in the same manner as though there had been no attempted transfer."

Haster v. Blair, supra, p. 899.

4. The rule that no immediate delivery is required where the transferee is already in possession is founded upon necessity and the avoidance of absurd or idle acts.

"It can hardly be contended that the respondent should have driven the horses away from both his ranchos. That would be almost the equivalent of saying that he should have put himself out of the actual possession in order to have kept himself within the legal possession."

Hogan v. Cowell, supra, p. 213.

"It is axiomatic that the law does not require the doing of an absurdity; so if the purchaser is already in possession of the property as the vendee or agent of the vendor, no further delivery is needed or can be made when he purchases the property. Otherwise the purchaser would be compelled to put himself out of actual possession in order to acquire a legal possession . . ."

12 Cal. Jur. 1004.

"The exceptions to the rule requiring a change of possession to accompany an absolute sale to free it from the imputation of fraud, arising from the character and situation of the property, will be considered together. They both rest on the same ground, namely, the absurdity of requiring that which is impossible or highly impractical; . . ."

Freeman on Executions, 3rd Ed., Sec. 153, p. 724.

"If the bailee himself becomes the purchaser of the property, it is manifest that there cannot be any visible change of possession, and hence, none is required. He may continue in possession as before."

Freeman on Executions, *supra,* p. 733.

"The sale by one of several joint owners also furnishes an exception to the rule that there must be a change of possession. If the cotenant selling is in the sole possession, he ought to give possession to his vendee; but if the other cotenants are in possession the vendor has no right to take it from them. He

may, therefore, from necessity make a valid sale without placing the property in the custody of his vendee."

Freeman on Executions, *supra,* p. 734.

5. A delivery of the assets of the business by the bankrupt to appellant at any time after the bankrupt acquired an interest as a tenant in common in those assets would have been an act in derogation of his title as a tenant in common.

Each tenant in common is entitled to possess and use the whole property, the possession of one being in contemplation of law the possession of all the co-owners, and none of the co-owners is entitled to a possession which excludes for *any period of time* a like possession of his co-owners.

Krum v. Malloy (1943), 22 Cal. 2d 132, 135, 137 P. 2d 18;

Johns v. Scobie (1939), 12 Cal. 2d 618, 623, 86 P. 2d 820, 121 A. L. R. 1404.

The principle that each tenant in common is entitled to the possession of the common property for every instant of time during which the cotenancy exists has been held applicable to cotenancies in personal property.

Krum v. Malloy, supra.

"Tenants in common are seized *per my* and not *per tout,* and are entitled to the possession of the whole. This must be so because no one of them can certainly state which part of the property is his own;

and further, a tenant in common is not *seised per my et per tout,* for such a tenure would make him a joint tenant. Tenants in common, hold the common land by unity of possession, and each of them has the right to enter upon and occupy the whole and every part thereof. This being so, such a tenant has no right to exclude his cotenant from any portion of the common lands. So a tenant in common of an undivided portion of the property is entitled to the possession of the whole thereof as against all persons except his cotenants."

7 Cal. Jur. 345-6.

"It is an established principle of law that a tenant in common cannot maintain an action against his cotenant for the recovery of the common property or even for his undivided interest therein, for each tenant in common has an equal right to the possession of the whole."

7 Cal. Jur. 365.

Appellant's position can be succinctly stated: any required delivery of the property by the bankrupt to appellant while the property was community would have been in derogation of the bankrupt's community title, and after the conversion of the ownership to a tenancy in common, such a required delivery would have been in derogation of the bankrupt's title as a tenant in common.

IV.

Appellant's Interest Was in the Assets of the Business and Not in the Net Worth Thereof.

1. The order of the Referee is inconsistent with the conclusions of law. The order adjudges that Christine Allen has no interest in the assets of the business. The conclusions of law purport to construe the property settlement agreement, as awarding her as a tenant in common in the *net worth* of the business.

2. The conclusions of law insofar as they purport to construe the agreement as awarding Christine Allen an interest as a tenant in common in the net worth of the business and not in the assets thereof, is an unwarranted construction of a plain and unambiguous agreement. The term "net worth" is not used expressly or by implication in the agreement and, indeed, the term has been imported into the conclusions of law in violence to the express provisions of the agreement.

3. By the express terms of the property settlement agreement, it was provided that upon the entry of an interlocutory decree of divorce the business shall be owned by the parties as tenants in common, each owning an undivided one-half interest.

> "The drug store above referred to shall continue to be owned by the parties hereto as community property, or in the event an interlocutory decree of divorce is obtained by either party then as tenants in common, each owning an undivided one-half interest." [Tr. p. 55.]

4. Christine Allen's interest in the business is that of a tenant in common in the assets of the business and not in the net worth of the business for the following reasons:

a. Paragraph "Fourteenth" of the property settlement agreement uses language of ownership of property rather than the language of a right *in personam* against her husband to share in the net worth of the business. Attention of the court is drawn to the fact that the provision is couched in the terms of ownership of physical assets. The term "drug store" is used in the first three sentences of Paragraph Fourteenth and is obviously used in each of these sentences in the same sense, namely, the physical assets of the business. In the second sentence the term could have no meaning other than that the physical assets of the business were to remain under the active management of the husband. The third sentence uses the term in connection with the eventual sale of the business and here again physical assets are clearly indicated. There is no reason why this term when used in the first sentence, has any different meaning. The term "drug store" is equivalent to the term "business," and like the term "grocery store," "machine shops," "bakery" and like enterprises is an expression signifying the totality of assets devoted to the operation of the enterprise.

b. The term "net worth" is not found anywhere in the agreement or the decree.

c. The conclusion of the Referee that Christine Allen owns an undivided one-half interest in the net worth of the business ignores the provisions of Paragraph "First" of the agreement that each party

thereto is *"released and absolved from any and all obligations and liabilities for the future acts and duties of the other . . ."* and that each releases the other from all debts incurred by the other after the date thereof. If Christine Allen's interest was in the "net worth" only, of the business, she would not be protected in the terms of this paragraph.

d. By the terms of Paragraph "Third" of the property settlement agreement, Christine Allen was given the immediate right to dispose of any property set over to her by the terms of the agreement and by the terms of Paragraph "Second" the property which she received by the terms of the agreement was her sole and separate property. Moreover, by Paragraph "Sixth" the parties agree to execute documents to make the real and personal property of the parties reflect the "record ownership" as in the agreement provided.

e. The property settlement agreement provided that Christine Allen was to receive $15,000.00 from the sale of the drug store in the event it was sold in satisfaction of her "right, title and interest in and to the drug store." If her interest were in the "net worth" this provision would be nugatory and unintelligible.

f. Partners have merely an interest in the net worth of a business and their ownership as tenants in partnership of the business is an ownership subject to the payment of firm debts. The Referee has found that no partnership exists between the bankrupt and Christine Allen, yet, in holding her interest to be in the "net worth" only, she is treated in effect, a partner.

g. By the terms of the property settlement agreement, in the event the drug store was sold, $15,000.00 was to be paid to appellant from the proceeds of such sale in full satisfaction of her right, title, and interest therein [Tr. pp. 55 to 56]. Unless sooner sold, the husband was to purchase "the interest of said wife in said business" on or before December 15, 1951, either for cash or upon the payment of $5,000.00 down and the balance in monthly installments [Tr. pp. 56 to 57]. The business was never sold and the bankrupt never took steps to purchase the wife's interest in the same, and there are no findings to that effect. However, the agreement recognizes that the wife was to have an interest in the assets of the business until such time as the husband (bankrupt) paid her $5,000.00 down.

> "Upon the payment of the initial deposit, the husband shall receive from the wife a bill of sale to said business, and shall execute and deliver to her a chattel mortgage on all of the trade fixtures, and equipment of said business, a first lien, as security for the establishment of the trust fund." [Tr. p. 57.]

h. If Christine Allen's interest were an interest in the "net worth" and not in the assets, the provision that her husband would on or before December 15, 1951, purchase her interest unless sooner sold, by the payment to her of $15,000.00 in accordance with the provisions of Paragraph Fourteenth, would receive a strained and unnatural construction in that no one could predict what the net worth of any business would be two and one-half years in advance and make commitments in respect thereto.

V.

A Tenant in Common Is Not Liable for the Debts Incurred by a Cotenant in the Operation of the Cotenancy Property in the Absence of Authority Given to the Cotenant to Incur Such Obligations and Mere Silence of the Tenant With Knowledge of the Cotenant's Operation Does Not Constitute Such Authority.

It is the contention of appellant that the property settlement agreement and the decrees of divorce must be construed in the light of the decisions holding that a tenant in common is not liable for the debts incurred by a cotenant in the operation of cotenancy property in the absence of authority given to the cotenant to incur such obligations. There is no finding in this case that appellant ever authorized the bankrupt to incur any debts in the operation of the business and the property settlement agreement clearly denies the bankrupt's authority to incur any such debts.

1. Tenancy in common can exist in personalty.

Krum v. Malloy (1943), 22 Cal. 2d 132, 137 P. 2d 18;

Higgins v. Eva (1928), 204 Cal. 231, 239, 267 Pac. 1081.

2. A tenant in common has no power to bind any of his cotenants by contract and no action of one of them can impair the rights of the others.

Brown v. Oxtoby (1941), 45 Cal. App. 2d 702, 709, 114 P. 2d 622;

Most v. Passman (1937), 21 Cal. App. 2d 729, 731, 70 P. 2d 271;

7 California Jurisprudence 358.

3. A tenant in common is not liable for the debts incurred by a cotenant in the operation of the common property in the absence of express authorization.

Higgins v. Eva (1928), 204 Cal. 231, 239, 267 Pac. 1081.

4. Silence and knowledge are not the equivalent of authorization.

Higgins v. Eva, supra, p. 240.

5. In the operation of common property, one tenant invests his own money at his own peril and at his own risk, and if the venture results in a loss he cannot call upon his cotenants for contribution or reimbursement.

Higgins v. Eva, supra, pp. 240-241;

7 California Jurisprudence 350.

6. Where the buyer buys personal property and attaches it to or incorporates it in a larger mass, and where the buyer by contract has agreed with the owner of the larger mass that the title to such additions is to pass to the owner of the larger mass upon such attachment or incorporation, the contract is valid under Section 3440 and the owner of the larger mass acquires title to the addition, in the absence of an equitable estoppel running against him.

Dersch v. Thomas (1934), 138 Cal. App. 785, 30 P. 2d 630.

VI.

There Is No Finding That Any Creditor of the Bankrupt Suffered Any Prejudice or Was Misled by Either the Execution of the Property Settlement Agreement or the Entry of the Interlocutory or Final Decrees of Divorce.

The property settlement agreement was based upon a fair consideration running from one to the other. Its execution is wholly free from actual fraud. There is no finding that by its execution or by reason of the subsequent decrees, any creditor was misled or suffered prejudice. There is no finding to bring the case within any of the provisions of the Uniform Fraudulent Conveyance Act (Secs. 3439.04 to 3439.06, Civ. Code).

Conclusion.

It is the contention of Appellant that the order on Petition for Review given and entered by the lower court on July 31, 1951, which affirmed the order given and entered on July 10, 1951, by Referee Brink, be reversed, and that it be held:

1. That appellant acquired, and is the owner, under the terms of the property settlement agreement and the Interlocutory Decree, of an undivided one-half interest, as tenant in common, with the bankrupt, of the assets of the business known as "Jerry's Drugstore," free and clear of all creditors' claims against bankrupt.

2. That the transfer of Appellant's community property interest in the drugstore business, as tenant in com-

mon with the bankrupt in said business and the assets thereof, was not a void transfer as against creditors or the Trustee in Bankruptcy.

Respectfully submitted,

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